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Ho Ken Seng v Progressive Insurance Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-03-(IM)-82 OF 2010
ALIZATUL KHAIR, ABDUL AZIZ AB RAHIM AND VARGHESE GEORGE JJCA
14 OCTOBER 2014

C

Bankruptcy — Creditor's petition — Failure to extract creditor's petition — Creditor's petition first filed in 1996 — Re-filing of creditor's petition in 2004 due to failure to extract — Granting of receiving and adjudication orders — Time when act of bankruptcy occurred — Affidavit of truth of statement in petition — Whether petition in order — Bankruptcy Act 1967

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The respondent/judgment creditor ('R/JC') had filed a creditor's petition in 1996 ('1996 petition'). The act of bankruptcy was alleged to have been committed by the appellant/judgment debtor ('A/JD') in 1996. Therefore, it was contended that the 1996 petition was filed within six months of the act of bankruptcy. The R/JC claimed that between the years 1996 to 2004, they could not extract the sealed copy of the creditor's petition from the court because the court had allegedly misplaced it; and the re-filing of the 1996 petition was done on an express direction of the High Court. In 2004, a fresh affidavit of truth was affirmed and filed and the same, together with a 2004 petition, were served on the A/JD. The senior assistant registrar granted the receiving and adjudication orders ('RO and AO') and the High Court judge dismissed the A/JD's appeal against the granting of the said RO and AO. Hence, the present appeal. The appellant submitted that, inter alia, the 2004 petition did not comply with the Bankruptcy Act 1967 ('the Act') and was defective and/or invalid; and the 2004 petition made out of time as it was filed some eight years after the act of bankruptcy.

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Held, allowing the appeal:

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(1) The date of presentation of the creditor's petition was recorded as 9 March 2004. It was manifest that the act of bankruptcy did not take place within six months of the presentation of the creditor's petition. The 'accompanying petition' referred in the affidavit could only have referred to the defective creditor's 2004 petition. If it was the intention of the deponent to refer to the 1996 petition, then it would not be unreasonable to expect the R/JC to attach or exhibit a file copy of the same together with the said affidavit. The affidavit filed on 9 March 2004 could have

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identified the 1996 petition with more particularity. There were too many loose ends that could have been rectified by the R/JC but was left undone (see paras 15(d), 20 & 22).

(2) The discrepancies highlighted in the 2004 petition could not bear out the R/JC's contention to the effect that what was re-filed in 2004 and served on the A/JD was the one and same creditor's petition filed in 1996. The 2004 petition showed significant areas of uncertainty and confusion. The creditor's petition relied upon by the R/JC to obtain the RO and AO was therefore defective and invalid. Section 131 of the Act could not be invoked to save the defect or irregularities highlighted. Since the bankruptcy orders had penal consequences, the A/JD would suffer substantial injustice if the RO and AO was not set aside (see paras 23–24).

[Bahasa Malaysia summary

Responden/pemiutang penghakiman ('R/JC') telah memfailkan petisyen pemiutangan pada tahun 1996 ('1996 petisyen'). Tindakan kebankrapan didakwa dilakukan oleh perayu/penghutang penghakiman ('A/JD') pada tahun 1996. Oleh itu, ia dihujahkan bahawa petisyen 1996 difailkan dalam masa enam bulan dari tindakan kebankrapan. R/JC mendakwa bahawa di antara tahun-tahun 1996 ke 2004, mereka tidak dapat mengekstrak salinan petisyen pemiutang yang dimeterai daripada mahkamah kerana mahkamah telah didakwa tersilap meletakkannya; dan pemfailan semula petisyen 1996 dilakukan atas arahan segera Mahkamah Tinggi. Pada tahun 2004, afidavit kebenaran baru disahkan dan difailkan dan ianya, bersama dengan petisyen 2004, diserahkan ke atas ID. Timbalan kanan pendaftar membenarkan perintah penerimaaan dan penghakiman ('RO dan AO') hakim Mahkamah Tinggi menolak rayuan A/JD terhadap RO dan AO tersebut. Maka, rayuan ini. Perayu berhujah bahawa, antara lain, petisyen 2004 tidak mematuhi Akta Kebanrapan 1997 ('Akta') dan adalah cacat dan/atau tak sah; dan petisyen 2004 dibuat luar masa kerana ia difailkan lapan tahun selepas tindakan kebankrapan .

Diputuskan, membenarkan rayuan:

(1) Tarikh penyerahan petisyen pemiutang direkodkan sebagai 9 Mac 2004. Ia jelas ditunjukkan bahawa tindakan kebankrapan tidak mengambil tempat dalam masa enam bulan penyerahan petisyen pemiutang tersebut. 'Accompanying petition' yang dirujuk dalam afidavit hanya mungkin merujuk kepda petisyen 2004 pemiutang yang cacat. Jika ia adalah niat deponen untuk merujuk kepada 1996 petisyen, oleh itu ia adalah tidak munasabah untuk menjangka R/JC untuk mengepilkan atau melampirkan salinan failnya bersama afidavit tersebut. Afidavit yang difailkan pada 9 Mac 2004 boleh mengenal pasti petisyen 1996 dengan lebih ketelitian. Terdapat banyak yang tidak dapat dijelaskan yang boleh

diperbetulkan oleh R/JC tetapi dibiarkan (lihat perenggan 15(d), 20 & 22).

(2) Perbezaan yang diketengahkan dalam petisyen 2004 tidak dapat dipertahankan hujahan R/JC sehingga memberi kesan bahawa apa yang difailkan semula pada tahun 2004 dan diserahkan ke atas A/JD adalah satu dan petisyen pemiutang yang sama yang difailkan pada tahun 1996. Petisyen 2004 menunjukkan bahagian penting ketidakpastian dan kekeliruan. Petisyen pemiutang yang digunakan oleh R/JC untuk memperolehi RO dan AO oleh itu adalah cacat dan tak sah. Seksyen 131 Akta tidak dapat dibangkitkan untuk menyelamatkan kecacatan atau luar aturan yang diketengahkan tersebut. Memandangkan perintah kebankrapan mempunyai akibat keseksaan, A/JD akan mengalami ketidakadilan substansial jika RO dan AO tidak diketepikan (lihat perenggan 23–24).]]]

Notes

For cases on creditor's petition in general, see 1 *Mallal's Digest* (5th Ed, 2015) paras 3245–3286.

Cases referred to

J Raju M Kerpaya v Kwong Yik Bank Berhad [2012] 1 CLJ 66, CA (refd)
Normah Kassim; ex parte Public Finance Berhad, Re [2002] MLJU 422; [2002] 4 CLJ 649, HC (refd)
North; ex parte Hasluck, Re [1895] 2 QB 264, CA (refd)

Legislation referred to

Bankruptcy Act 1967 ss 5, 5(1), 6, 131
Bankruptcy Rules 1969 r 117

SS Muker (GK Ganesan and Daljeet Singh with him) (Daljeet S Sachdev & Co) for the appellant.
M Menon (Jaffar & Menon) for the respondent.

Varghese George R/JCA:

INTRODUCTION

[1] The notice of appeal filed on 9 April 2010 by the appellant – judgment debtor ('the A/JD') was against two decisions of the High Court made on 11 March 2010. The decisions appealed from were:

(a) the dismissal by the High Court of A/JD's appeal (*lampiran* 26) against the order of the deputy registrar refusing to set aside the bankruptcy notice dated 8 August 1995; and

(b) the dismissal by the High Court of A/JD's appeal (*lampiran* 29) against the senior assistant registrar's decision of 16 August 2007 granting the receiving and adjudication orders ('RO and AO') upon hearing the creditors' petition presented by the respondent; judgment creditor ('the R/JC').

[2] Before us A/JD confined his appeal in respect of the High Court decision in two above only. Basically A/JD's contention was that the particular creditors' petition upon which the RO and AO had been granted was defective and/or invalid and the orders ought not to have been made against him on 16 August 2007.

BACKGROUND

[3] The significant developments related to the subject matter of this appeal in chronological sequence were as tabulated below:

20 March 1990	–	R/JC obtained judgment against A/JD.
8 August 1995	–	Bankruptcy notice ('BN') was filed by R/JC.
9 January 1996	–	By order of court, the validity of the BN was extended and ordered to be served by substituted service on A/JD.
29 March 1996	–	Act of Bankruptcy deemed to have been committed by A/JD.
25 September 1996	–	A creditors' petition together with affidavit of truth of statement in petition was filed by R/JC in court. This was within six months of the Act of Bankruptcy. (Official praecipe was produced to confirm this filing)
1996 to 2004	–	R/JC claim that they could not extract for service the sealed copy of the 'creditors' petition' from the court despite various attempts. The explanation given by the court, according to R/JC, was that the creditors' petition had been misplaced in the court registry and could not be traced.
	–	R/JC state that in 2004 (that is some eight years later), their solicitors were asked to refile the creditors' petition and the affidavit – utilising the same praecipe.
9 March 2004	–	R/JC refiled the creditors' petition and a fresh affidavit as to truth of statement in petition (affirmed also on that date).

28 September 2004	–	The refiled creditors' petition and affidavit were served personally on the A/JD
3 December 2004	–	Notice of intention to oppose petition was filed and served by the A/JD.
28 February 2005	–	A/JD filed application to strike out the BN and creditors' petition.
8 January 2007	–	Deputy registrar of court dismissed the A/JD's application to strike out the BN and the creditors' petition.
12 January 2007	–	Appeal to judge in chambers against the decision of the deputy registrar was filed by A/JD. (A/JD application for stay pending disposal of this appeal was refused).
16 August 2007	–	RO and AO was granted by the senior assistant registrar of court.
22 August 2007	–	A/JD filed notice of appeal to judge in chambers against the RO and AO.
11 March 2010	–	The learned High Court Judge dismissed both the appeals of the A/JD.
9 April 2010	–	A/JD lodged notice of appeal to the Court of Appeal against the decision of the learned judge of 11 March 2010.
11 November 2011	–	The appeal of A/JD came up for hearing at Court of Appeal. The appeal was struck out (by a majority decision) on the ground that A/JD had not obtained 'sanction' to proceed with the appeal.
08 December 2011	–	A/JD filed for leave to appeal to the Federal Court.
21 November 2012	–	Federal Court heard A/JD's appeal
10 January 2013	–	Federal Court allowed A/JD's appeal and ordered that the appeal be reheard by the Court of Appeal.
10 December 2013	–	Appeal heard by this panel.

APPELANT /JUDGMENT DEBTOR'S SUBMISISON

[4] The thrust of A/JD's contention was that in this matter there were two creditors' petition filed by the R/JC, namely the first one filed on 25 September 1996 (according to R/JC)(1996-CP) and the other being the one filed on 9 March 2004.

The creditors' petition that was served on the A/JD was only the second one

filed on 9 March 2004 (2004-CP) together with the 'affidavit as to truth of statement in petition' affirmed on 9 March 2004.

[5] It was contended that the 2004-CP did not comply with ss 5 and 6 of the Bankruptcy Act 1967 ('the BA 1967') and was accordingly defective and no RO and AO ought to have been granted based on the 2004-CP. More specifically, the 2004-CP was filed some eight years after the Act of Bankruptcy and was out of time.

[6] It was urged upon us to take particular note that the sealed copy of the 1996-CP, by the R/JC own version of events, was not served on A/JD at all (due to it being misplaced or going missing in the court registry).

[7] In any event, even if the operative creditors' petition was to be the 1996-CP, there was no 'affidavit as to the truth' produced in respect of the 1996-CP. Further, any creditors' petition filed ought to have been served immediately or at the very least within 'reasonable time' not after a delay of eight years as was the case here.

[8] Since the purpose of the creditors' petition was to move the court to declare a person to be a bankrupt and since the consequences were quasi-penal, if not penal in nature, there ought to be strict compliance by the R/JC with the law (*Re North; ex parte Hasluck* [1895] 2 QB 264)

It was urged upon us that any doubt or ambiguity that arose in that process or in any related papers, should be construed in favour the party against whom the orders were being sought (here the A/JD).

R/JC's CONTENTION

[9] The refiling of the 1996-CP in 2004 was done on express direction of the Shah Alam High Court. There were no two creditors' petition but only one namely the 1996-CP. The fresh affidavit of truth affirmed and filed on 9 March 2004 was similarly done on the instruction of the court and particularly referred to the Act of Bankruptcy committed by A/JD of 29 March 1996.

[10] The 1996-CP was filed within six months of the Act of Bankruptcy, together with an 'affidavit of truth of statement in petition' affirmed then, as evidenced by the praecipe for filing produced to court. Service of the 1996-CP could not be effected by factors beyond the control of R/JC.

[11] In any event the A/JD had not complied with r 117 of the Bankruptcy

Rules, 1969 ('the BRules') by giving the appropriate notice under Form 16 to oppose the 2004-CP.

[12] It should also be noted that there is no time deadline stipulated in the BA 1967 or the BRules 1969 before which the creditors' petition had to be served. On good authority of decided cases (both in the High Court and the Court of Appeal), there was also no requirement that the verification-affidavit was to be a condition precedent for the presentation of the creditors' petition, nor was it a requirement that such affidavit be served at all on the judgment debtor; the rationale being that such verification-affidavit was merely to enable the court to make appropriate orders on the creditors' petition. (*Re Normah Kassim; Ex Parte Public Finance Berhad* [2002] 4 CLJ 649; *Mat Ripen bin Mat Elah v Perwira Affin Bank Berhad* [2005] MLJU 12(unreported); the Court of Appeal in *J Raju M Kerpaya v Kwong Yik Bank Berhad* [2012] 1 CLJ 66).

[13] Counsel for R/JC also drew our attention to s 131 of the BA 1967 and contended that no proceeding in bankruptcy was liable to be invalidated even for any formal defect or irregularity unless the court was of the opinion that substantial injustice had been ocassioned.

OUR OBSERVATION AND DECISION

[14] The starting point for our consideration would be the creditors' petition that was served on the A/JD and based upon which the RO and AO were granted to R/JC on 16 August 2007. This was the 2004-CP. It was necessary to refer to this refiled 2004-CP in its entirety and accordingly we reproduce below the same for ease of reference:

A

IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN BANKRUPTCY NO. 29 – 2098 – 95

B

RE : HO KEN SENG (NRIC NO. 8245195) ... JUDGMENT DEBTOR

EX-PARTE : PROGRESSIVE INSURANCE SDN BHD ... JUDGMENT CREDITOR

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CREDITORS' PETITION

We, **PROGRESSIVE INSURANCE SDN BHD** the Judgment Creditor of **9th, 10th and 15th Floors, Menara BGI, Plaza Berjaya, No. 12, Jalan Imbi, 55100 Kuala Lumpur**, hereby petition this Court that a Receiving Order and Adjudicating Order may be made in respect of the estate of **HO KEN SENG** (NO. K/P: **8245195**) of **No. 2, Jalan Jelai 3, Kawasan 6, Taman Kim Chuan, Pandamaran, 42000 Port Klang, Selangor Darul Ehsan** and lately residing at the aforesaid address and say:-

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1. That the said Judgment Debtor is domiciled in the Federation or in any state or within one year before the date of the presentation of the Petition has ordinarily resided or had a dwelling house or place of business in the Federation personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in the Federation by means of a partner or partners or an agent or manager.

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2. That the said **HO KEN SENG**, the said Judgment Debtor is justly and truly indebted to us in the aggregate sum of **RM2,835,179.38** made up inclusive of interest up to **08.08.1995** and costs obtained by **PROGRESSIVE INSURANCE SDN BHD** against the said **HO KEN SENG**, the said Judgment Debtor in the Kuala Lumpur High Court vide Suit No. **D1 - 22 – 145 – 90** dated **20.03.90**.

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PARTICULARS OF AMOUNT CLAIMED

a)	Judgment sum	RM1,963,488.33
b)	Add interest at **8%** per annum on **RM1,963,488.33** from 22.1.90 until 08.08.95 (2025 days)	RM 871,466.05
c)	Costs	RM 225.00
		RM2,835,179.38

3. That we do not, nor does any person on our behalf hold any security on the said Judgment Debtor's estate, or any part thereof for the payment of the said sum.

4. That the said **HO KEN SENG** within six (6) months before the date of the presentation of this PETITION has committed an act for Bankruptcy namely that the said **HO KEN SENG** has failed to comply with the requirements of the BANKRUPTCY NOTICE dated **08.08.1995** duly served on him by way of substituted service on the **12.03.1996** thereby committing an act of BANKRUPTCY on **29.03.1996**.

Dated this day of - 9 MAR 2004, 2004

Signed for and on behalf of the Judgment Creditor for its Authorised Agent

JOHARI BIN NORDIN
(NRIC NO: **580902-06-5393**)
PROGRESSIVE INSURANCE SDN BHD

Signed by the Agent of the Judgment Creditor authorised in my presence.

Signature of Witness]
]
]

MURALEE MENON
ADVOCATE & SOLICITOR
KUALA LUMPUR.

Address]
]
]
]
]
]

MESSRS JAFFAR & MENON
UNIT 2-7-7 & 2-7-8, TINGKAT 7,
MENARA KLH BUSINESS CENTRE,
NO. 2, JALAN KASIPILLAY
OFF JALAN IPOH,
51200 KUALA LUMPUR

Description) Advocates & Solicitors

ENDORSEMENT

This **PETITION** having been presented to the court on the 25 SEP 1996 day of 2004 it is **ORDERED** that this **PETITION** shall be heard at the High Court of Malaya at Shah Alam on the 12 MAY 2005 day of 25 SEP 2004 2004 at 9.00 o'clock.

AND you the said **HO KEN SENG** is to take notice that if you intend to dispute the truth of any of the statements contained in the PETITION you must file with the Registrar of this Court a notice showing the grounds upon which you intend to dispute the same and send by post a copy of the NOTICE to the Judgment Creditor **three (3) days** before the date fixed for hearing.

Dated this day of 25 SEP 1996 2004

SENIOR ASSISTANT REGISTRAR
HIGH COURT
SHAH ALAM

Registered as CREDITORS' PETITION NO. 29-96 OF 2004

CLERK
HIGH COURT
SHAH ALAM

Kepada:

HO KEN SENG
(NRIC NO: **8245195**)
NO. 2, JALAN JELAI 3
KAWASAN 6, TAMAN KIM CHUAN
PANDAMARAN
42000 PORT KLANG
SELANGOR DARUL EHSAN

This **CREDITOR'S PETITION** is filed by **MESSRS JAFFAR & MENON**, solicitors for the Judgment Creditor abovenamed whose address for service is at **Unit 2-7-7 & 2-7-8, Tingkat 7, Menara KLH Business Centre, No. 2, Jalan Kasipillay, Off Jalan Ipoh, 51200 Kuala Lumpur.**

Ruj : **JM/L/0020(103)/94**

No. Tel : 03-23811500

No. Fax : 03-23811505

[15] The following need to be highlighted with reference to the contents or what is stated in the creditors' petition:

(a) the heading of this refiled 2004-CP appear to refer to the creditors' petition filed in 1996 (1996-CP) as follows:

> IN THE HIGH COURT OF MALAYA AT SHAH ALAM IN BANKRUPTCY NO 29–2098–95

(b) at para 2 the interest calculated on the judgment sum and claimed is made out to be up to 8 August 1995 only;

(c) at para 4 it is stated that A/JD '… within six months before the date of the presentation of this PETITION has committed an act of bankruptcy namely …'. The particulars of the BN and date of the Act of Bankruptcy

nevertheless coincided with R/JC's version of events subsequent to the judgment being obtained against A/JD.

(d) *however*, the date of presentation of this creditors' petition was recorded:

> Dated this day of – 9 MAR 2004, 2004.

It was manifest that the 'act of bankruptcy' relied upon by the R/JC did not take place within six months of the presentation of this creditors' petition on *9 March 2004*.

(e) moving on then to p 3 of this creditors' petition in the part bearing the heading *'ENDORSEMENT'* it was stated:

> this petition having been presented to the court on 25 SEP 1996 day of 2004; and
>
> dated this day of 25 SEP 1996 2004

In respect of (i) above the rubber-stamped date of '25 SEP 1996' seem to have been superimposed on another rubber stamped date which could be made out to be '... AR 2005'. In any event here and on the date of the endorsement itself, the year typed-in, ie '2004' was not deleted.

(f) *most telling however* was the further annotation at the bottom of p 3 of the creditors' petition which read:

> Registered as Creditors' Petition No. 2996 of *2004* (Emphasis added.)

[16] In our assessment the materiality or significance of the discrepancies highlighted by us in (c) and (f) in the preceding para 15 could not be downplayed or easily dismissed by the court.

[17] In para 4 of the creditors' petition, it alludes to *an Act of Bankruptcy committed by the A/JD within six months before the presentation of the* petition and which date of presentation is borne out as '9 MAR 2004' just above where the signature for or on behalf of the R/JC was set out.

It was the R/JC's position always that the Act of Bankruptcy was committed on 29 March 1996. If so this creditors' petition dated 9 MAR 2004 (by R/JC themselves) was filed in contravention of the provision of s 5(1) BA 1967, the relevant part of which reads:

> 5. Condition on which creditor may petition,
>
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:

(a) ...

(b) ...

(c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and

(d) ...

[18] Even if there was still any doubt whether what was filed in 2004 was a fresh creditors' petition or it was the refiled 1996-CP (as vehemently maintained by counsel for R/JC), in our view, this was put to rest, where in the further annotation by the 'Clerk High Court, Shah Alam (at bottom of p 3) it was stated '... creditors petition No 2996 of 2004.'

[19] We also make reference to the so called fresh 'affidavit of truth of statement in petition' affirmed on 9 March 2004, which is reproduced below for ease of reference:

IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN BANKRUPTCY NO. 29 – 2098 – 95

RE : HO KEN SENG (NRIC NO. 8245195) ... JUDGMENT DEBTOR

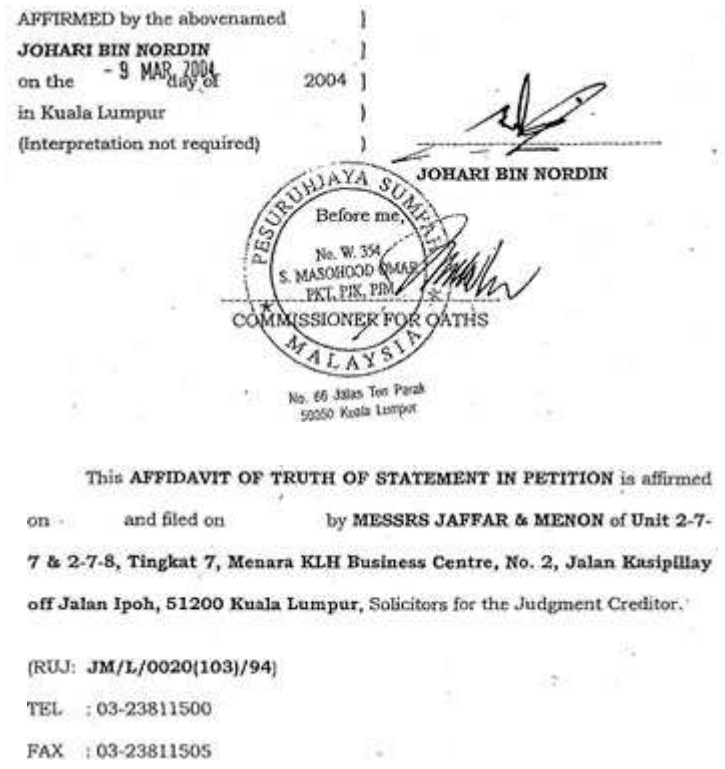
EX-PARTE : PROGRESSIVE INSURANCE SDN BHD ... JUDGMENT CREDITOR

AFFIDAVIT OF TRUTH OF STATEMENT IN PETITION

I, **JOHARI BIN NORDIN** (NRIC NO: **580902-06-5393**) a Malaysian Citizen of full age and residing at **No. 4, Jalan 14/27A, Seksyen 5, Wangsa Maju, 53300 Kuala Lumpur** hereby solemnly affirm and say as follows:-

1. I am the Assistant General Manager (Claims) of the Judgment Creditor abovenamed and am authorised to make this AFFIDAVIT on behalf of the Judgment Creditor.

2. That the statements in the accompanying PETITION are true to my personal knowledge.



AFFIRMED by the abovenamed)
JOHARI BIN NORDIN)
on the - 9 MAR 2004 day of 2004)
in Kuala Lumpur)
(Interpretation not required))

JOHARI BIN NORDIN

PESURUHJAYA SUMPAH
Before me,
No. W. 354
S. MASOHOOD AMAR
PKT, PJK, PJM
COMMISSIONER FOR OATHS
MALAYSIA
No. 66 Jalan Tun Perak
50050 Kuala Lumpur

This **AFFIDAVIT OF TRUTH OF STATEMENT IN PETITION** is affirmed on and filed on by **MESSRS JAFFAR & MENON** of **Unit 2-7-7 & 2-7-8, Tingkat 7, Menara KLH Business Centre, No. 2, Jalan Kasipillay off Jalan Ipoh, 51200 Kuala Lumpur,** Solicitors for the Judgment Creditor.

(RUJ: **JM/L/0020(103)/94**)
TEL : 03-23811500
FAX : 03-23811505

[20] The affidavit, no doubt was filed in 'In Bankruptcy No 29–2098–95'. An 'accompanying PETITION' was referred to by the deponent at para 2 of the affidavit and it could only have referred to the defective creditors' petition no 2996 of 2004 as shown above, filed on the same date with the said affidavit.

If it was the intention of the deponent to refer to the 1996-CP, then it would not be unreasonable to expect the R/JC to attach or exhibit a file-copy of the same (which surely would have been available with solicitors for R/JC in any event) together with this affidavit in question. There was none produced in this instance.

[21] In our view, it was incumbent upon R/JC and their solicitors to ensure that the creditors' petition filed on 9 March 2004, reflected or was a copy of the 1996-CP, if at all this court was to be sympathetic to their explanation that it was done at the behest of the Shah Alam High Court. The affidavit also filed on 9 March 2004 could have identified (as the accompanying petition) the 1996-CP with more particularity.

What was before us was therefore total indifference and a clear example of

dereliction of responsibility on the part of the R/JC or its solicitors. This could not be condoned by the court.

[22] More importantly in our view, solicitors for R/JC ought to have obtained a correction to the annotation 'registered as creditors petition No 2996 of 2004' at the earliest opportunity to reflect the petition No in 1996 or at the least sought for an order of court that this creditors' petition filed in 2004 was for all intent and purposes a copy of the 1996-CP, before service of the 2004-CP was effected on the A/JD. There were too many loose ends that could have been rectified by R/JC but left undone.

[23] In the event, we were constrained to conclude that the discrepancies highlighted in the 2004-CP could not bear out the R/JC contention to the effect that what was refiled in 2004 and served on the A/JD was the one and same creditors' petition, filed in 1996 (the 1996-CP). There was on the face of the 2004-CP significant areas of uncertainty and confusion which the High Court had overlooked and allowed to stand. The creditors' petition relied upon by the R/JC to obtain the RO and AO, in our assessment was therefore definitely defective and invalid and ought to have been so ruled by the senior assistant registrar and the learned judge who heard the appeal.

[24] This was not a case, in our view, where s 131 of the BA 1967 could be invoked by R/JC to save the defect or irregularities highlighted. Bearing in mind also that bankruptcy orders had penal consequences, we further held that the A/JD would suffer substantial injustice if the RO and AO granted on 16 March 2007 was not set aside. The very foundation upon which the RO and AO was obtained was unsustainable and no order to be made at this stage could remedy the same in any event.

[25] Accordingly we allowed the appeal unanimously.

Appeal allowed.

Reported by Afiq Mohamad Noor